IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1192 of 2002

with

SPECIAL CIVIL APPLICATION Nos 4995 and 4997 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

GUJARAT PRADESH PANCHAYAT PARISHAD

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1192 of 2002

MR TUSHAR MEHTA for Petitioner No. 1-3

MR SN SHELAT, ADVOCATE GENERAL with MS MANISHA LAVKUMAR, AGP for Respondent No. 1-2

NOTICE SERVED BY DS for Respondent No. 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 25/10/2002

C.A.V. JUDGEMENT

All these petitions filed by the Gujarat Pradesh Panchayat Parishad and the District Panchayat of three Districts viz. Sabarkantha, Jamnagar and Junagadh and their respective Presidents raise important questions about interpretation of Section 162 and other provisions of the Gujarat Panchayats Act, 1993 (hereinafter referred to as "the Act"). The controversy essentially revolves round the scope of powers of the President and the District Development Officer in the administration of a District Panchayat.

The thrust of the petitioners' case is that the District Development Officer is none more than an ex-officio Secretary of the District Panchayat and that under Section 162 of the Panchayats Act, he is required to perform all the functions and exercise all the powers only in accordance with the orders of the President and/or of the District Panchayat and that on his own the District Development Officer can do nothing without the prior orders of the President of the District Panchayat.

2. Although it is not customary for a Court to give any synopsis of its judgment, looking to the length of this judgment, this Court would like to undertake this venture:-

SYNOPSIS OF THE JUDGMENT:

PARA

1. Introduction

2. Synopsis

3. Facts

4. Major Constitutional and Statutory Provisions

5. Petitioners' Submissions

6. Respondents' Submissions

DISCUSSION

7. Article 243-G and Scheme of Gujarat Panchayats Act, 1993

8. Is President of District Panchayat like Chief

Minister of State - What are princples underlying Panchayats Act.

9. Executive Powers vested in DDO - Their exercise subject to the orders, if any, of President

10. Elected Officer bearers and Civil Servants

11. Sections 161, 162 and 227 of the Act

12. Panchayats Act and BPMC Act

13. Three Areas of DDO's Functions Demarcated

14. Parameters and modalities for State Government Control

15. Summary of Conclusions

16. Legality of Resolutions of District Panchayat

17. ORDERS

3.0 FACTS

3.1 In view of the nature of the controversy between the parties, only broad facts are required to be narrated without referring to minor bickerings between the President and the District Development Officer of the concerned District Panchayat.

3.2 The Gujarat Pradesh Panchayat Parishad, petitioner No. 1 in the lead petition (Special Civil Application No. 1192 of 2002), was registered as a society under the Societies Registration Act, 1860 on 27.9.1965. All the District Panchayats, Taluka Panchayats and Gram Panchayats who opt for being admitted to its membership are members of the Parishad. It purports to protect the interests of the panchayats in the State of Gujarat so as to enable them to function as institutions of local self government. Petitioner No. 2 in the lead petition is the Sabarkantha District Panchayat consisting of elected representatives. The present term of the District Panchayat commenced from 6.10.2000. Petitioner No. 3 in the lead petition is the President of the Sabarkantha District Panchayat.

3.3 In the year 1977, the State Government had issued a circular dated 30.6.1977 (Annexure "B") purporting to clarify the scope of Section 143(1) of the Gujarat

Panchayats Act, 1961 about the powers of the President and the District Development Officer. In the matters regarding appointment, transfer, promotion, seniority, disciplinary action etc. regarding the panchayat employees which are regulated by the Rules, the District Development Officer can follow such Rules and pass appropriate orders and if such Rules do not confer any powers on the District Panchayat or its President, the District Panchayat or the President cannot pass any orders restricting the powers of the District Development Officer. Even in the matters other than staff matters, if there are statutory Rules governing the subject, the same position will prevail. Even in the matters which are not covered by the statutory Rules, the District Development Officer may exercise his powers subject to the orders of the District Panchayat or the President in accordance with the provisions of the Gujarat Panchayats Act, 1961 but the District Panchayat or its president cannot restrict the exercise of powers of the District Development Officer under Section 143(1) of the Gujarat Panchayats Act, 1961. It was further clarified in the circular that the District Development Officer is to exercise his quasi-judicial powers according to his own discretion and the President of the District Panchayat cannot control the exercise of the powers of the District Development Officer under the Rules. The State Government accordingly requested all the District Panchayats and their Presidents to re-examine the orders or resolutions passed by the President of the District Panchayat restricting the powers of the District Panchayat under Section 143(1) of the 1961 Act.

3.4 Shortly thereafter the State Government issued another circular dated 19.7.1977 (Annexure "C") instructing the District Development Officers that, pending further orders of the State Government which may be issued upon the recommendations which may be made by a Committee for suggesting amendments to the Gujarat Panchayats Act, 1961, for administrative convenience in the matters of transfer of panchayat employees, the District Development Officer should take the decision after prior consultation with the President of the District Panchayat, subject to the instructions and directions of the State Government regarding transfer matters. The above circular was clarified by the circular dated 14.4.1978 (Annexure "D") to the effect that for administrative convenience the District Development Officer is to have prior consultation with the President of the District Panchayat in matters of transfer of employees, but after such consultation the District Development Officer has to take his own decision

in accordance with the Rules and standing instructions of the State Government regarding transfers.

3.5 Pursuant to the representations made by the Gujarat State Panchayat Council at its meeting held on 7.7.1988, the State Government issued circular dated 13.1.1989 (Annexure "F") withdrawing the aforesaid circulars dated 13.6.1977, 19.7.1977 and 14.4.1978 with a clarification that the District Development Officers and the Taluka Development Officers and the Presidents of the District Panchayats and Taluka Panchayats shall exercise their respective powers in accordance with the statutory provisions. Under the Act, special powers have been vested in the officers, but the control of the State Government over administrative matters of the panchayat shall remain unfettered. In case of difference of opinion or dispute between the Presidents of the District Panchayats and Taluka Panchayats on the one hand and the District Development Officers and Taluka Development Officers on the other hand, the guidance of the State Government shall be obtained.

3.6 Again on 17.8.1989 the State Government in the Panchayat Department issued two circulars (Annexure "G" colly.) making an attempt to clarify the scope of powers of the President of the District Panchayat/Taluka Panchayat and the District Development Officer/Taluka Development Officer under Sections 143 and 123 of the Act, but again these circulars also came to be reviewed by the State Government and cancelled by circular dated 24.4.1990 (Annexure "H"). It is, therefore, not necessary to make any further reference to the said circulars dated 17.8.1989.

3.7 The Sabarkantha District Panchayat approached this Court by filing Special Civil Application No. 4927 of 1990 praying for a direction that the District Development Officer should exercise his executive powers and more particularly powers regarding transfer of employees of the District Panchayat subject to the orders of the President of the District Panchayat. That petition came to be admitted and ad-interim orders dated 10.7.1990 were passed by this Court staying the operation of the circulars issued by the State Government.

3.8 It is the petitioners' case that after the constitution of the Sabarkantha District Panchayat for the term commencing from 6.10.2000, the District Panchayat and its President felt that the District Development Officer, Sabarkantha, respondent No. 3 herein, was functioning on his own and ignoring the

President of the District Panchayat in the administrative matters and more particularly in the matters of transfer, promotion, postings and other service conditions of the employees and officers of the Panchayat and, therefore, the General Body of the Sabarkantha District Panchayat passed resolution No. 6 dated 21.11.2001 (Annexure "L"). The District Panchayat resolved that the District Development Officer shall consult the President of the District Panchayat in all matters including submitting proposals to the State Government regarding all works of the District Panchayat and also in all matters of all the projects of the District Panchayat including proposals for land, expenditure or development projects and also in all matters relating to recruitment, appointment, transfer, promotion, and training of all panchayat employees in Class-III and Class-IV (including primary teachers) and in all matters relating to appointment and transfers of Class-II officers being sent on deputation by the State Government to the panchayats. The District Panchayat also resolved that the District Development Officer be called upon to consult the President in all matter and to abide by the interim orders passed by the High Court on 11.7.1990 in Special Civil Application 4927 of 1990. Thereafter by Office Order dated 13.12.2001 (Annexure "M") the President of the District Panchayat directed respondent No.3, District Development Officer, Sabarkantha to place all the files relating to the recruitment, appointment, promotion, transfer and deputation of all Class-III and Class-IV employees in the District Panchayat (including primary teachers and Education Inspectors) and relating to appointment, transfer and deputation of all Class-II officers to the District Panchayat for consultation with the President.

The petitioners have also made grievance about directions being given by the ministers in charge of departments other than the Panchayats Department in the matters pertaining to administration of panchayats.

3.9 In Special Civil Application No.1192 of 2002, which is the lead petition with all the pleadings filed by the parties, the petitioners have prayed for a direction to the District Development Officers of all the District Panchayats in the State to discharge their functions in accordance with Section 162 of the Act and to take decisions including the recruitment and/or appointment, transfer and postings of the Officers and employees of the District Panchayat only in accordance with the orders of the President and/or the District Panchayat and also prayed for a declaration that the District Development Officer of a District Panchayat has

no power, jurisdiction or authority to take any administrative decisions without obtaining orders from the President of the District Panchayat or from the District Panchayat. It is further prayed that the District Development Officer be directed to comply with the orders passed by the President of the District Panchayat on 13th December, 2001.

3.10 Similarly Jamnagar and Junagadh District Panchayats have filed the other two petitions with similar prayers. In these two petitions also, the petitioners have prayed for the writ to the District Development Officer to comply with the directions dated 13.12.2001 issued by the Presidents of the respective District Panchayats, though no such directions dated 13-12-2001 are produced alongwith the memo of the petition except the order dated 3.9.2001 passed by the President of the Junagadh District Panchayat directing the District Development Officer to assign duties to the officers in panchayat services or State services or All India services only after obtaining written consent of the President and in accordance with the instructions/suggestions of the President and similar order passed by the President of the Jamnagar District Panchayat.

4. MAJOR CONSTITUTIONAL & STATUTORY PROVISIONS

Before enumerating the rival contentions, a brief reference may be made to the relevant principal constitutional and statutory provisions which are required to be interpreted for the purpose of deciding the controversy involved in these petitions.

Article 243-B of the Constitution provides for establishment of Panchayats at village, intermediate and district levels.

Article 243-G of the Constitution reads as under:-

243-G: POWERS, AUTHORITY AND RESPONSIBILITIES OF PANCHAYATS:

Subject to the provisions of the Constitution, the Legislature of State may, by law, endow the panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-Government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the

appropriate level, subject to such conditions as may be specified therein with respect to -

(a) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule.

After establishment of the State of Gujarat, the constitution and functioning of the panchayats at various levels was governed by the provisions of the Gujarat Panchayats Act, 1961. After 72nd constitutional amendments, the State Legislature enacted the Gujarat Panchayats Act, 1993 to bring the law relating to the Panchayats in the State in conformity with Part IX of the Constitution.

Section 83 enumerates the powers and functions of the President and Vice- President of the District Panchayat in the following terms:-

83 - POWERS AND FUNCTIONS OF PRESIDENT AND VICE-PRESIDENT:

(1)(a) The President shall -

(i) convene, preside at and conduct meetings of the district Panchayat.

(ii) have access to the records of the Panchayat;

(iii) discharge all duties imposed and exercise all the powers conferred on him by or under this Act;

(iv) watch over the financial and executive administration of the Panchayat and submit to the Panchayat all questions connected therewith which shall appear to him to require its orders; and

(v) exercise administrative supervision over the District Development Officer for securing implementation of resolutions or decisions of the Panchayat or of any

committee thereof.

(b) The President may in cases of emergency, direct the execution or suspension or stoppage of any work or the doing of any act which requires the sanction of the Panchayat or any authority thereof and immediate execution or doing of which is, in his opinion, necessary for the service or safety of the public and may direct that the expenses of executing such act shall be paid from the District fund.

... ...
... .

161. Secretary and Officers and Servants of District panchayat.- (1) Subject to the provisions of this Act and the rules made thereunder-

(a) there shall be a secretary for every district panchayat;

(b) a District Development Officer posted under the panchayat, shall be Ex-Officio Secretary of the Panchayat;

(c) a district panchayat shall have such other officers and servants as may be determined under section 227.

(2) The officers and servants referred to in clause (c) of sub-section (1) shall be appointed by such authority and their conditions of service shall be such as may be prescribed.

(3) The officers and servants appointed under sub-section (2) shall in the discharge of their functions and duties, exercise such powers as may be conferred on them by the panchayat subject to rules, if any, made in this behalf.

162. Powers and functions of District Development Officer.- (1) Save as otherwise expressly provided by or under this Act, the executive powers of a district panchayat for the purpose of carrying out the provisions of this

Act, shall vest in the District Development Officer who shall subject to the orders, if any, of the President or of the district panchayat, as the case may be -

(a) perform all the functions and exercise all the powers specifically imposed or conferred upon him by or under this Act, or under any law for the time being in force; and

(b) lay down the duties of all officers and servants of the district panchayat,

(2) Subject to the Provisions of this Act and the rules made thereunder the District Development Officer shall -

(a) be entitled to -

(i) attend the meetings of the district panchayat, or any of its committee;

(ii) call for any information, return, statement, account or report from any officer or servant of or holding office under, the district panchayat;

(iii) grant leave of absence to such class of officers as may be prescribed by rules;

(iv) call for an explanation for any officer or servant of or holding office under the district panchayat;

(b) subject to the control of the district panchayat, discharge duties and perform functions, in respect of matters which by or under this Act are not expressly imposed or conferred on any committee, presiding officer or any officer of the district panchayat;

(c) appoint such class of officers and servants as may be prescribed;

(d) supervise and control the execution of all activities of the district panchayat;

(e) take necessary measures for the speedy execution of all works and development schemes of the district panchayat;

(f) have custody of all papers and documents connected with the proceedings of meetings of the district panchayat and of its committee;

(g) assess and give his opinion confidentially every year on the work of the officers holding office under the district panchayat; forward them to such authorities as may be prescribed by the State Government and lay down the procedure for writing such reports about the work of officers and servants under the district panchayat;

(h) draw and disburse money out of the fund;

(i) exercise supervision and control over the acts of officers and servants holding offices under the district panchayat in matters of executive administration and those relating to accounts and records of the district panchayat; and

(j) exercise such other powers and perform such other functions as may be prescribed by the State Government.

(3)(a) Save as provided in clause (b), the District Development Officer may subject to such conditions as he may think fit to impose, delegate any of his powers and functions to any officer or servant holding office under the district panchayat, provided such officer or servant is not below such rank as may be prescribed.

(b) ....

(4) Subject to the other provisions of this Act, the District Development Officer shall be under the general control of the district panchayat.

Section 227 provides for constitution of Panchayat service in connection with the affairs of panchayats which shall be distinct from the State service. The State Government may, by order from time to time, determine the classes, cadres, posts and initial strength of officers and servants in the panchayat service. For altering class, cadre or numbers of posts so determined by the State Government, the district panchayat will require previous approval of the State Government.

Sub-section (5) of Section 227 of the Act reads as under:-

(5) Subject to the provisions of this Act, the State Government may make rules regulating the mode of recruitment either by holding examinations or otherwise and conditions of service of persons appointed to the panchayat service and the powers in respect of appointments, transfers and promotions of officers and servants in the panchayat service and disciplinary action against any such officers or servants.

PETITIONERS' SUBMISSIONS

5. Mr Tushar Mehta, learned counsel for the petitioners has made the following submissions :-

5.1 Section 83 (1)(a)(iv) and (v) of the Act confers powers upon the President of the district panchayat to watch over the financial and executive administration of the Panchayat and the power to exercise administrative supervision over the District Development Officer. Reliance is placed on the definitions of the words "administration" and "supervision" with reference to Black's Law Dictionary (6th Edition), Law Lexicon (1997 Edition) and the decisions of the Apex Court in State of Bihar vs. J.A.C. Saldanna, AIR 1980 SC 326 and in Rai

Sahib Ram Jawaya Kapur vs. State of Punjab, AIR 1955 SC 549.

5.2 Sub-section (1) of Section 162 clearly provides for the following aspects:-

(i) The executive powers of a District Panchayat are vested in the District Development Officer 'for the purpose of carrying out the provisions of the Act' .

(ii) The exercise of such executive powers is subject to other express provisions made by or under the Act (unlike exclusive powers conferred upon the Municipal Commissioner under the BPMC Act), and

(iii) The District Development Officer is statutorily required to perform 'all the functions and exercise all the powers' which are conferred upon him 'by or under this Act' (i.e. under the Rules) subject to the orders, if any, of the President or of the District Panchayat.

Sub-section (2) of Section 162 enumerates other powers of the District Development Officer which are specifically made subject to the provisions of the Act including the provisions of Section 162 (1) of the Act. In other words, the powers conferred under Section 162(2) of the Act shall also be required to be exercised and performed subject to the orders of the President or of the District Panchayat.

5.3 Though the District Development Officer is appointed by the State Government under Section 161 of the Act, the District Development Officer is required to function as a Secretary of the Panchayat which is a Constitutional Institution of self-Government having autonomous functioning conferred by the Constitution itself. Section 161 of the Act makes it very clear that the DDO is the ex-officio Secretary of the Panchayat, and having said that the Legislature provides that the DDO will exercise executive powers of the Panchayat subject to the orders, IF ANY, of the President or the District Panchayat, as the case may be. The term "executive functions" is not defined in the Act. The said term is judicially defined in the judgment of the Hon'ble Supreme Court of India reported in AIR 1955 SC 549.

The term "IF ANY" necessarily and inevitably presupposes existence of an order prior to the DDO exercising his executive functions. Any other meaning

given to the term "IF ANY" would destroy the very purpose of the Legislation and the Constitution conferring the supremacy to the elected representative of the people. The very object behind the Constitutional mandate is to bring power to the people and to ensure that functioning of the District Panchayats in rural areas is entrusted to the peoples' representatives.

5.4 The term "same is otherwise expressly provided by or under this Act" takes care of those powers which are exclusively, specifically and unequivocally conferred upon the DDO as a named designated officer and the said saving clause saves the powers of the DDO which are uninterrupted powers and are not subject to the orders of either the President or the District Panchayat. Except those powers specifically conferred upon the DDO as a designated officer, the executive powers are intended to be exercised subject to the orders of the President or the District Panchayat. It may not be possible for the DDO to obtain orders specifically on each and every issue concerning day-to-day administration of the panchayat. The District Panchayat has, therefore, as pointed out hereinabove, passed a Resolution which is an order as contemplated under Section 162(1) of the Act directing the DDO to exercise the powers mentioned in the said Resolution after consulting the President of the Panchayat. There is no provision of "consultation". However, the District Panchayat, in exercise of its powers under Section 162(1) has directed the DDO to exercise his executive powers with regard to the subjects mentioned in the Resolution in consultation with the President of the Panchayat which ensures the fulfillment of the object of the Act and further smoothens the administration of the Panchayat.

5.5 Clause 162(1)(a) of the Act makes it further clear that the DDO is required to perform ALL FUNCTIONS and EXERCISE ALL THE POWERS SPECIFICALLY IMPOSED OR CONFERRED UPON HIM BY OR UNDER THIS ACT i.e. even if some rules are framed under the Act which confer powers upon the DDO he shall have to exercise such powers as per Section 162(1) i.e. subject to the orders of the President or of the District Panchayat.

The exercise of powers under Section 227(5) of the Act by the District Development Officer and his subordinate officers is statutorily made subject to the provisions of the Act i.e. provisions of Section 83 read with Section 162 of the Act. In other words, even if the District Development Officer exercises the powers under the Rules framed under Section 227(5) of the Act, such

powers would necessarily be exercise of executive powers and would be subject to the orders which the President or the District Panchayat may pass. Such powers would also be subject to the powers of the President to exercise administrative supervision under Section 83(1)(a)(v) of the Act. As the Panchayat as well as the President of the Panchayat have already passed an order as contemplated under Section 162 of the Act requiring the District Development Officer to exercise his executive functions enumerated in the Resolution dated 21.11.2001 (Annexure "L") after consultation with the President, the District Development Officer is required to exercise his executive functions including the functions mentioned in the said Resolution as per the orders of the President of the District Panchayat.

5.6 Reference is also made to the opinion of the Joint Secretary to the Government in the Legal Department circulated alongwith the RLA's letter dated 12.5.1964 stating as under :-

> "The powers exercisable by a District Development Officer power section 143 of the Gujarat Panchayat Act, 1961 are not absolute but the exercise of those powers is subject to the orders of the District Panchayat in the circumstances, it is competent for the district panchayats or the president to make orders directing the District Development Officer not to exercise any of the powers conferred upon him under the said Act. This view is supported by the Supreme Court's decision in Municipality of State of Bombay (AIR-1962 S.C. P.988). .. .."

5.7 A perusal of the Eleventh Schedule in juxta-position to the Twelfth Schedule of the Constitution which pertains to the Municipal Councils and Municipal Corporations shows that the items specified in the Eleventh Schedule directly affect and concern rural part of the country keeping in mind the needs and aspirations of common-men living in villages. In this regard, a comparison of Article 243-W read with Twelfth Schedule of the Constitution makes it clear that there is a different Constitutional mandate for Panchayats governed by Chapter-IX of the Constitution on the one hand and Municipal Councils and Municipal Corporations dealing with urbanized local bodies constituted under Chapter IX-A of the Constitution on the other hand. Detailed reference is made to the provisions of the Bombay Provincial Municipal Corporation Act, 1949 to contrast the status and powers of the Municipal

Commissioner vis-a-vis the Mayor and the Standing Committee on the one hand and the status and powers of the District Development Officer vis-a-vis President and District Panchayat under the Panchayats Act on the other hand. It is contended that because the Municipal Corporations are local self-government institutions for urban areas, wider powers are conferred on the Municipal Commissioner who may not be subject to control, supervision or orders of the Mayor, Standing Committee or the Municipal Corporation but the local self-government institutions under the Panchayats Act are meant for rural areas in the country, and keeping in mind their needs and aspirations, both the Constitution as well as the Panchayats Act have made provision for local self-institutions at the grass-root level and, therefore, greater powers are conferred on the elected representatives of the people at the grass-root level and, therefore, the District Development Officer is required to exercise his power and perform his functions subject to the orders of the President and the District Panchayat consisting of the elected representatives of the people at the grass-root level.

RESPONDENTS' SUBMISSIONS

6. On the other hand, Mr SN Shelat, learned Advocate General with Ms Manisha Lavkumar, learned AGP have made the following submissions:-

6.1 The focus in the original petition was only regarding the powers of the District Development Officer in service matters like transfer, appointment, promotion etc.. The President is only interested in those spheres of administration which, apart from being matters of day-to-day administration, are specifically assigned to the District Development Officer under the statutory rules framed under Section 227 of the Act.

The relief claimed by the petitioners that the President and/or the District Panchayat is required to be consulted for appointment, transfer, promotion and disciplinary action is not warranted under the provisions of the rules framed for the purpose. The State Government had by a resolution under Section 162 required the DDOs that while passing any order of transfer, the President of the District Panchayat may be consulted. In view of the resolution of the State Government, the DDOs have been consulting the President of the District Panchayat.

6.2 Recourse to sections 161 and 162 is taken by the

petitioners inter-alia for contending that the rules framed under Section 227 are subject to the provisions of the Act, that is to say that the rules are subject to other provisions of the Act including Section 161 and 162. But the provisions of Section 161 themselves provide that they are subject to the other provisions of the Act and the rules and therefore the President and District Panchayat are bound by statutory rules.

Section 161(3) provides that Officers and servants are to exercise their powers as may be conferred upon them by the Panchayat subject to rules, if any, made. Therefore, the powers of the Panchayat are subject to the statutory rules framed under Section 227 and when the statutory rules provide for mode of recruitment, appointing authority, promotions and conditions of service, it is not competent for the President and/or the District Panchayat to interpose himself/itself and take over the power of appointing and determining the conditions of service.

Section 162(1) provides that the executive powers of the District Panchayat for the purpose of carrying out provisions of the Act vest in the District Development Officer. The vesting of the powers in the District Development Officer is subject to express provisions made under the Act. Therefore vesting of the power is also subject to the provisions of Section 227(5) of the Act.

6.3 Section 162(1) provides that the executive powers of the District Panchayat vested in the District Development Officer shall be subject to the orders, if any, of the President of the District Panchayat as the case may be. The powers which the District Development Officer is to exercise do not require prior permission or approval of the President or the District Panchayat. In the events that have occurred, the President and District Panchayat as the case may be, can make an order if required in a given case in respect of the powers that are exercised by the District Development Officer.

6.4 The President or the District Panchayat are not empowered under the Act to issue and interfere with the day-to-day administration. Further, provisions of section 162 i.e. Section 162(2)(c), (e),(g),(l) and (j) are relevant. The District Development Officer is to appoint officers and servants as may be prescribed. He has to supervise and control execution of all activities. He has to take measures for speedy execution of all works and development schemes. He has to make reports regarding working of the officers. He has to supervise

and control the act of officers and servants in the matters of executive administration. He has to exercise powers and perform functions prescribed by the Government.

Reading Section 162, it is submitted that interference of the President or the District Panchayat in the day-to-day administration is not called for. The administration is to be run under the control of the District Development Officer and that in a given situation, the Panchayat or the President may call for and draw the attention of the District Development Officer. But in respect of powers and functions which the District Development Officer exercises under the Statutory Rules, no interference of the President or the District Panchayat is called for.

6.5 Section 163 provides for budget and, therefore, only budgeted expenses can be incurred. Once the policies regarding budget are laid down, the implementation thereof is to be carried out by the DDO. While executing the projects also, day-to-day interference of the President or the District Panchayat is not provided under the provisions of Sections 162.

6.6 Referring to Section 83, the President has to watch over financial and executive administrative administration of the Panchayat and exercise administrative supervision over the District Development Officer for securing implementation of the resolutions or the decisions of the Panchayat or of any Committee thereof. Section 83, therefore, also does not provide for day-to-day interference by the President or the District Panchayat. The President undoubtedly has the jurisdiction to over see implementation of the policies and to instruct the District Development Officer to take corrective measures.

6.7 The State Government has entrusted to the DDO the implementation of the projects for which the DDO is accountable to the State Government directly. Such projects are the projects of the State Government. In respect of these projects which have been entrusted by the State Government to the DDO, the District Panchayat and/or the President have no say. The DDO is not answerable to the President or the Panchayat in respect of implementation of the projects which are so entrusted. The DDO is accountable to the President or the District Panchayat in respect of the projects which are the policy decisions of the Panchayat.

6.8 Reliance is placed on the decisions of the Apex Court in the cases of Bashiruddin Ashraf vs. The Bihar Subai Sunni Majlis Awaqf & Anr. AIR 1965 SC 1206, Subramaniam Shanmugham vs. M.L. Rajendran & Ors. AIR 1987 SC 2166, Tarlochan Dev Sharma vs. State of Punjab & Ors. AIR 2001 SC 2524 and A Sanjeevi Naidu vs. State of Madras & Anr. 1970(1) SCC 443 in support of the aforesaid submissions.

DISCUSSION

7.0 ARTICLE 243-G OF THE CONSTITUTION AND SCHEME OF THE PANCHAYATS ACT, 1993

7.1 Before dealing with the submissions, it is necessary to appreciate the scheme of the Gujarat Panchayats Act, 1993, because even Article 243-G of the Constitution conferring constitutional status on the panchayats as institutions of self government leaves the extent of devolution of powers to the State Legislature. The said Article provides that the State Legislature may, by law, endow the panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein.

7.2 Elected Heads of Panchayats

The 1993 Act continues the basic pattern of Panchayats i.e. the three tier system of Panchayats at village level, intermediate or taluka level and district level. The President of the Village Panchayat (called Sarpanch) is to be directly elected by the people of the village under Section 9(3)(b) of the Act. The other members of the Village Panchayat are also to be directly elected by the village people. The elected members of the Panchayat elect the Vice-President of the Village Panchayat called Up-Sarpanch from amongst themselves.

The members of the Taluka Panchayat are elected by the people of the Taluka and the members of the Taluka Panchayat so elected further elect their President and the Vice-President from out of themselves. Similarly, the members of the District Panchayat are elected by the people of the District and the members of the District Panchayat so elected further elect the President and the Vice-President of the District Panchayat out of themselves under Section 77(1).

A motion of no confidence against the Sarpanch and Up-Sarpanch of the village Panchayat or against the President and Vice-President of the Taluka Panchayat/District Panchayat can be moved by a simple majority of the members of the concerned Panchayat, but such motion can only be carried by a majority of not less than two-thirds of the total number of members of the concerned Panchayat.

7.3 Secretaries of Panchayats

The Secretary of the Village Panchayat called Talati-cum-Mantri belongs to the district cadre and is appointed by the District Panchayat through selection made by the District Panchayat Services Selection Committee and appointed by the Deputy District Development Officer who is an officer of the District Panchayat, but a member of the State cadre and posted by the State Government under a particular District Panchayat. Like DDO, a Deputy DDO is also transferrable from one District Panchayat to another.

The Secretary of the Taluka Panchayat called the Taluka Development Officer is a gazetted Officer of the State Government appointed by the State Government. He is also transferrable by the State Government from one Taluka Panchayat to another in the State.

The District Development Officer (Ex-officio Secretary of the District Panchayat) is an Officer of the State Government in the Indian Administrative Service cadre and posted by the State Government. He is also liable to be transferred from one District Panchayat to another and liable to be recalled to State services.

7.4 Sarpanch of Village Panchayat & President of District Panchayat

The following comparative provisions vesting executive powers of the concerned village Panchayat on the one hand and the District Panchayat on the other hand clearly bring out the different roles which the State Legislature has contemplated for the village Sarpanch on the one hand and the President of the District Panchayat on the other hand.

Village Panchayat District Panchayat

---

55. Executive functions of Sarpanch or Upa-Sarpanch. (1) Save as otherwise expressly provided by or under this Act, the executive power, for the purpose of carrying out the provisions of this Act and the resolutions passed by a village panchayat shall vest in the Sarpanch thereof who shall be directly responsible for the due fulfillment of the duties imposed upon the panchayat by or under this Act. In the absence of the Sarpanch his powers and duties shall, save as may be otherwise prescribed by rules, be exercised and performed by the Upa-Sarpanch.

114. Secretary and servants of panchayats.- (2) A Secretary of a village panchayat shall subject to the control of the Sarpanch-

(a) keep in his custody the records and registers of the panchayat,

(b) issue receipts under his signature for sums of money received by him on behalf of the panchayat,

(c) prepare all statements and reports required under this Act, and

(d) perform such other functions and duties under this Act as may be prescribed.

162. Powers and functions of District Development Officer-. (1) Save as otherwise expressly provided by or under this Act, the executive powers of a district panchayat for the purpose of carrying out the provisions of this Act, shall vest in the District Development Officer

who shall subject to the orders, if any, of the president or of the district panchayat, as the case may be -

(a) perform all the functions and exercise all the powers specifically imposed or conferred upon him by or under this Act, or under any law for the time being in force; and

(b) lay down the duties of all officers and servants of the district panchayat.

83. Powers and functions of President and Vice-President- (1)(a) The President shall-

(i) convene, preside at and conduct meetings of the district panchayat;

(ii) have access to the records of the panchayat;

(iii) discharge all duties imposed, and exercise all the

powers conferred on
him by or under
this Act;

(iv) watch over the
financial and
executive adminis-
tration of the
panchayat and
submit to the
panchayat all
questions connected
therewith which
shall appear to
him to require
its orders; and

(v) exercise adminis-
trative supervision
over the District
Development Officer
for securing
implementation of
resolutions or
decisions of the
panchayat or of
any Committee
thereof.

7.5.0 Powers And Functions Of District Panchayat

7.5.1 Sub-part (B) of Part III of the Act contains provisions relating to Administrative Powers and Duties of the District Panchayats - Sections 154 to 156 of the Act. The relevant provisions read as under:-

154.Administrative Powers of Panchayats.-

Subject to the provisions of this Act, it shall be the duty of each district Panchayat to make in the area within its jurisdiction and so far as the fund at its disposal will allow, reasonable provision in regard to all or any of the matters specified in Schedule III.

Schedule III may be summarized as under:-

Part I - Matters in respect of which it is the duty of District Panchayat to make provision.

1. In the sphere of sanitation and health-

establishment and maintenance of dispensaries;

provision and maintenance of drinking water supply;

establishment and maintenance of primary health centres;

assisting family planning;

2. In the sphere of public works -

construction and maintenance of roads;

execution of works entrusted to it by the State Government;

construction and maintenance of buildings required for the activities of the district Panchayat.

3. In the sphere of education and other cultural activities-

planning of education in the district within the frame work of the national policy and the national plan;

distribution of Government aid in regard to primary education between the taluka panchayats;

recognizing private educational institutions within its area;

4. In the sphere of administration -

periodical supervision and evaluation of the projects and programmes entrusted to the different panchayats in the district;

5. In the sphere of community development -

6. In the sphere of agriculture -

....

7. In the sphere of animal husbandry -

....

8. In the sphere of village and small scale industries -

examining the possibilities of village industries and small scale industries in the district, preparation and execution of plans for their revival, organization and development;

....

establishing, maintaining, expanding and aiding secondary, technical and industrial schools.

9. In the sphere of social welfare -

....

10. In the sphere of relief -

Establishment and management of relief centres in times of natural calamities such as famine and scarcity, floods, fire and earthquake.

11. In the sphere of minor irrigation projects -

Provision for irrigation by canals from tanks and bunds;

the implementation of the schemes of tube-wells.

digging new wells and repairing old wells for irrigation;

... .

Part II provides for functions and duties of Education committee of a District Panchayat.

Section 155 provides for other functions of the District Panchayats in respect of which it may, with the previous sanction of the State Government, incur expenditure.

7.5.2 Chapter VI of the Act provides for transfer of certain functions of the State Government under certain enactments and particularly Section 175 empowers the State Government, subject to appropriate conditions. to transfer to a district panchayat any powers, functions and duties relating to any matter within the domain of the State Government or any of its officers under any

enactment of the State Legislature or otherwise in the executive powers of the State relating to administrative matters arising within the district and on such transfer, the Government may allot to the district panchayat such fund and personnel as may be necessary to enable the district Panchayat to exercise the powers and discharge the functions and duties so transferred.

Section 178 also empowers the State Government to withdraw such powers, functions and duties which were earlier transferred to the district panchayat under section 175 of the Act.

Section 180 of the Act empowers the State Government to entrust various schemes to the Panchayats for their implementation.

7.6.0 Panchayat Funds

Chapter XI of the Act contains provisions regarding financial assistance to panchayats.

7.6.1 Section 158 provides for a district fund consisting of, inter alia,

(a) the proceeds of any tax or fee imposed under the Act;

(c) sums contributed to the district fund by the State Government;

(d) all sums received by way of loans from the State Government or otherwise;

Section 159 provides that all property vested in a district panchayat under the Act and all funds received by it in accordance with the provisions of the Act, and all sums accruing to it under the provisions of any law for the time being in force, shall be applied subject to the provisions and for the purposes of this Act and all such sums and funds shall be kept in such custody as may be prescribed;

Section 163 provides for budget estimates to be prepared by the district panchayats annually, and Section 165 provides that save in the case of a pressing emergency, no sum shall be expended by any district panchayat unless such sum is included in the approved budget estimate. In case of a pressing emergency, the explanation for such expenditure outside the budget would

have to be sent to the competent authority of the State Government. The annual statement of accounts together with the annual report of the district panchayat, to be prepared by the District Development Officer and approved by the District Panchayat shall be sent to the competent authority of the State Government before the prescribed date.

7.6.2 Section 218 of the Act provides that the State Government shall, having regard to the recommendations, if any, of the Finance Commission, in each year after due appropriation made by the State Legislature by law in this behalf make provision for making grants to the panchayats in accordance with this Chapter.

Chapter XII of the Act provides for constitution of a Finance commission as contemplated by Article 243-I of the Constitution.

7.7 CHAPTER XIII OF THE ACT CONTAINS PROVISIONS RELATING TO SERVICES. In view of the nature of the controversy in the present petition, detailed reference is required to be made to the said provisions.

Sub-section (1) to (4) of Section 227 provide for constitution of Panchayat service (distinct from State service) consisting of district cadres, taluka cadres and local cadres and also deputation posts. Sub-section (5) reads as under:-

(5) Subject to the provisions of this Act, the State Government may make rules regulating the mode of recruitment either by holding examinations or otherwise and conditions of service of persons appointed to the panchayat service and the powers in respect of appointments, transfers and promotions of officers and servants in the panchayats service and disciplinary action against any such officers or servants.

(6) Rules made under sub-section (5) shall in particular contain, inter-alia, a provision entitling servants of such cadres in the panchayat service to promotion to such cadre in the State service as may be prescribed.

(7) Such rules may provide for inter-district transfers of servants belonging to the panchayat service and the circumstances in which and the

conditions subject to which such transfers may be made."

Section 230 provides for allocation of officers and servants to panchayat service.

Section 228 provides, subject to the rules which the State Government may make in this behalf, that the expenditure towards the pay and allowances of payable to all officers and servants in panchayat service serving for the time being in any panchayat shall be met by the concerned panchayat from its own fund.

Section 235 provides for establishment of Gujarat Panchayat Service Selection Board for selecting candidates for recruitment to such posts in panchayat service and to advise the panchayat in such matters as may be prescribed by rules. The Chairman as well as the members of the said Board are to be appointed by the State Government.

Section 236 provides for establishment of District Panchayat Service Selection Committee and District Primary Education Staff Selection Committee in each district for selecting candidates for recruitment to such posts of the panchayat service and to advise the panchayats in such matters and to perform such other functions as may be prescribed.

Under the Act, the President of the District Panchayat is a member of the District Panchayat Service Selection Committee. Ordinarily he is nominated by the Committee as its Chairman.

Under the aforesaid statutory provisions, the State Government has framed the following rules:-

(i) Gujarat Panchayat Services Classification and Recruitment (General) Rules, 1998. The modes of appointment are by way of direct selection, promotion and transfer.

(ii) Gujarat Panchayat Service Selection Board (Functions) Rules, 1998 and the Gujarat Panchayat Service Selection Board (Consultation) Rules, 1998 :- The Board is constituted under Section 235 of the Act. The Board is to make selection for appointments to many of the posts in the district cadres under the District Panchayats. The advice of the Board is to be obtained in respect of appointment whether by nomination or

by promotion to any of the posts indicated in the schedule thereunder. The Board is also to be consulted in respect of disciplinary matters.

(iii) Gujarat Panchayat Services (Discipline and Appeal) Rules, 1997 vests the power to take disciplinary action against Panchayat employees; into the hands of the DDO, Dy. DDO and other Class-I officers.

(iv) Gujarat Panchayat Services (Appointing Authorities) Rules, 1996 provide for power to make appointments to posts specified in the Schedule. These rules also vest the power of appointing Panchayat employees in the hands of the DDO, Dy. DDO and other Class-I officers.

(v) Gujarat Panchayat Services (Transfer of Employees) Rules, 1995. Rule 2 confers power on various officers for transferring employees within the District, subject to instructions of the DDO. Rule 2 reads as under :-

"2. Transfers of Panchayat servants.The authority specified in column 1 of the Schedule annexed hereto shall have power to transfer the class of servants in the Panchayat Service specified against them in column 2 thereof subject to the provisions of sub-section (3) of Section 227 of the Gujarat Panchayat Act, 1993, and subject to such general or specific instructions, if any, as may be issued by the District Development Officer from time to time in this behalf."

Sub-section (3) of Section 227 provides that panchayat servants may be posted, whether by promotion or transfer, to any post within that cadre - district cadre, taluka cadre or local cadre - i.e. within the district, the taluka or the village, as the case may be.

Rule 3 provides for inter-district transfers.

Column 1 specifies Deputy DDO, Accounts Officer, District Agricultural Officer, District Animal Husbandry Officer, District Health Officer, Executive Engineer etc. as the competent transferring authority for different

cadres of District Panchayat employees and the DDO is specified as the competent transferring authority for all the posts in the District cadre in respect of which no other transferring authority is specified. Similarly the Taluka Development Officer is specified as the transferring authority for all the posts in the taluka cadre in respect of which no transferring authority is specified.

The State Government has issued notifications under section 268 providing for provisions as regards deputation of officers from the Panchayat to outside Panchayat service.

(vi) Bombay Primary Education Act, 1947 provides for appointment of Primary teachers, Supervisors and Administrative Officers. There are circulars issued by the State Government in that regard. Section 24(1) of that Act confers the power of transferring primary teachers on the District Primary Education Officer.

7.8 CHAPTER XIV OF THE ACT MAKES DETAILED PROVISIONS CONFERRING ON THE STATE GOVERNMENT THE POWERS OF CONTROL OVER PANCHAYATS.

While Section 237 provides that the power of the State Government to prepare Statewide projects and programmes concerning one or more districts is not affected, Section 238 reads as under:-

238. Panchayats to form part of Statewide Panchayats Organization and to perform functions so as to carry out the State policy.-

The village panchayats, taluka panchayats, and district panchayats, notwithstanding that they are separate bodies corporate having distinct territorial jurisdiction and distinct functions to perform-

(1) shall form part of the panchayat organization set up for the purpose of securing a greater measure of participation by the people of the State in local and governmental functions;

(2) shall perform the functions and duties assigned to them by or under this Act so as to conform to the State Five Year

Plans and the National Five Year Plans and to the State policy in general and shall give effect to such general or special directions as the State Government may from time to time by order in writing issue in that behalf;

(3) shall carry their administration faithfully and efficiently.

(emphasis supplied)

Section 239 empowers the State Government to depute an officer or person possessing practical knowledge and experience pertaining to a particular matter to attend the meetings of the panchayats or its committees.

Section 240 of the Act confers powers on the State Government to issue directions in the following terms:-

240. POWER OF GOVERNMENT TO ISSUE DIRECTIONS.-

Where the functions and duties assigned to village panchayats, taluka panchayats and district panchayats under the Panchayats Functions List relate to the same subject, then in order that the functions and duties may not overlap or that the responsibility for performing any such function or duty is not shifted by one panchayat to another on account of any ambiguity or misunderstanding, the State Government may, from time to time, by an order in writing issue to all or any of the panchayats such directions, as it may think necessary for avoiding any such overlapping of functions, or shifting of the responsibility and the panchayats shall be bound to exercise their powers, and perform their functions and duties in conformity with such directions.

Section 241 provides that a panchayt shall not commnece work or development scheme, even though it may be a part of its functions and duties under the Act, unless previous sanction has been accorded for the same by such authority as may be prescribed by the Rules in that behalf and unless a detailed estimate of the cost of such work or development scheme has been approved by the panchayat and the plan thereof is approved by the prescribed authority.

Section 242 confers power on the district panchayat to entertain an appeal against any order or decision of the village panchayat or taluka panchayat subject to the other provisions of the Act which include the power of the Taluka Development Officer under section 249 of Act to suspend the execution of any order or resolution of a village panchayat or prohibit the doing of anything which is unlawful. Similar powers are conferred on the District Development Officer in respect of any order or resolution of a taluka panchayat or a village panchayat and similar powers are conferred on the Development Commissioner/Officer authorized by the State Government in this behalf in respect of the decisions and resolutions of the district panchayat. Such powers are also conferred on the Collector of the district in respect of any order or resolution of any panchayat or doing of anything by the panchayat which is likely to cause injury or annoyance to the public or lead to a breach of peace.

Section 250 also confers emergency powers on the Taluka Development Officer in respect of village panchayats and on the District Development Officer in respect of taluka panchayats or village panchayats.

If a taluka panchayat or a panchayat has made default in performance of its duties, Section 252 confers power on the District Panchayat or its officer to take action for the performance of such duty and on the failure of the District Panchayat, the State Government may take action for the performance of such duties.

Section 253 confers powers on the State Government to dissolve or supersede any panchayat which exceeds or abuses its power or is incompetent to perform or makes persistent default in performing its duties or if it fails to obey any order made by the superior panchayat or by the State Government or its officer.

Section 258 empowers the State Government from time to time to cause inquiry to be made through its officers in regard to any panchayat or matters concerning it or to any matters with respect to which the sanction or order of the State Government is required under the Act.

Section 259 confers powers on the State Government to call for and examine the record and proceeding of any panchayat or of any committee thereof, or of any officer for the purpose of satisfying itself as

to the legality or propriety of any order passed and may revise or modify the order as it shall deem just.

7.9 Rule Making Power

Section 274 of the ACt confers powers on the State Government to make rules for carrying out the purposes of the Act. Sub-sections (5) to (7) thereof read as under :-

"(5) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication except where the rules provide for any of the matters specified in Chapter XIII.

(6) All rules made under this section shall be laid for not less than thirty days before the State Legislature as soon as possible after they are made, and shall be subject to such modifications as the legislature may make during the session in which they are so laid, or the sessions immediately following.

(7) Any modifications so made by the State Legislature shall be published in the Official Gazette and shall thereupon take effect."

8.0 IS PRESIDENT OF DISTRICT PANCHAYAT LIKE CHIEF MINISTER OF STATE ?

WHAT ARE PRINCPLES UNDERLYING PANCHAYATS ACT?

8.1 Before taking up the written submissions made by Mr Tushar Mehta for the petitioners, it is first necessary to state at the outset the underlying theme of Mr Mehta's submission which was voiced by him orally at the hearing, but not incorporated in the written submissions, that just as India is a union of States and just as the Chief Minister is the head of the Government in a State so also the State comprises of District Panchayats and the President of the District Panchayat is the head of the District Panchayat and, therefore, the President of the District Panchayat is to be regarded as having the same powers in the administration of District Panchayat which the Chief Minister has in the matters of State administration. Mr Mehta contended that if this argument is not accepted, it would amount to negation of democracy at the gross root level or denigrading the institution of the local self government, which the State

Legislature could not have intended contrary to the letter and spirit of the 72nd Amendment to the Constitution.

8.2 While the status of the President of the District Panchayat as the head of the District Panchayat cannot be disputed, the difficulty is in accepting the argumentative analogy that he is like the Chief Minister as the head of the Government in a State. A perusal of the above quoted provisions of the Constitution and of the Panchayats Act in para 7 above makes it clear that the Constitution has provided for democracy at the grass root level without giving a District Panchayat the status or powers of a province in a federation. The executive powers of the Union Government and the State Government are referable to Articles 73 and 162 respectively read with Articles 245 and 246 and Schedule VII to the Constitution. But the Constitution does not contain any such separate provision for Panchayats nor is there a provision of a separate "Panchayats List", unlike "State List" in Schedule VII to the Constitution. Article 243-G of the Constitution has left it to the State Legislature to determine the extent of devolution of powers upon Panchayats at the appropriate level, subject to such conditions as may be specified in the State enactment.

8.3 The State Legislature has enacted Gujarat Panchayats Act, 1993 under which each District Panchayat is required to discharge its duties and perform its functions in several spheres subject to control of the State government not merely in the matters of planning, but also in matters of execution. At the cost of repetition, it is necessary to note that Section 237 of the Act saves the powers of the State Government to prepare Statewide projects or programmes concerning one or more districts. Section 238 in categorical terms provides that the village panchayats, taluka panchayats and district panchayats, notwithstanding that they are separate bodies corporate having distinct territorial jurisdiction and distinct functions to perform, shall form part of the panchayat organization which shall perform the functions and duties assigned to them by or under the Act so as to conform to the State Five Year Plans and the National Five Plans and to the State policy in general and shall give effect to such general or special directions as the State Government may from time to time by order in writing issue in that behalf. Section 240 also empowers the State Government to issue directions in order that the functions and duties may not overlap between more than one panchayat and that the responsibility is not shifted by one panchayat to

another. Section 241 even goes to the length of providing that a panchayat shall not commence work or development scheme, even though it may be a part of its functions and duties under the Act, unless previous sanction has been accorded for the same by such authority as may be prescribed by the rules in that behalf and unless a detailed estimate of the cost of such work or development scheme has been approved by the panchayat and the plan thereof is approved by the prescribed authority.

8.4 A district panchayat cannot, therefore, arrogate to itself the status of a body as independent or autonomous as a province in a federation. Even the provisions of Part IX of the Constitution and Article 243-G inserted by the Constitution 72nd Amendment Act do not change this vital feature of the panchayat organization. All that Article 243-G of the Constitution does is to give constitutional status to the local self government institutions such as district panchayats, taluka panchayats and gram panchayats and municipal corporations and municipalities. The State Legislature cannot do away with these democratic bodies at the local level nor can their normal tenure be less than that prescribed in the Constitution and, therefore, elections to these bodies cannot be delayed (Article 243-E). But all the same, the said Constitutional amendments do not make the district panchayats independent autonomous bodies immune from any control of the State Government. With this perspective in mind, one has to examine the provisions of Sections 83, 161 and 162 of the Gujarat Panchayats Act, 1993 an Act made by the Legislative Assembly of the State of Gujarat which assembly itself comprises of elected representatives of people from all over the State i.e. from all the districts in the State of Gujarat.

8.5 What emerges from the above discussion is - the State Legislature has provided in the Panchayats Act fusion of the principle of local self government with the principle of centralized planning. The two principles may have the potential of conflicting with each other but the Legislature has by carefully selected expressions carved out distinct roles for the elected head of the institution and the permanent civil servant as explained hereinafter, and has also provided for the State Government control for specific purposes.

9.0 EXECUTIVE POWERS VESTED IN DDO

THEIR EXERCISE, SUBJECT TO THE ORDERS, IF ANY, OF THE PRESIDENT.

9.1 One aspect which is required to be borne in mind is that while the Panchayats Act confers upon the president of the district panchayat the status of the head of the institution and, therefore, the president of the district panchayat is vested with the power to watch over the financial and executive administration of the panchayat and power to exercise administrative supervision over the DDO (Sec. 83(1) of the Act), it is the DDO who is vested with the executive powers of the district panchayat, subject, of course, to the words "subject to the orders, if any, of the president of the district panchayat, as the case may be".

9.2 At this stage, reference is required to be made to the provisions of Sections 55(1) and 114(2) of the Panchayats Act dealing with the village panchayats and contrast to be found in the provisions of Sections 162(1) and 83(1)(a) in respect of the District Panchayats. A perusal of the said provisions set out in para 7.4 hereinabove clearly brings out the sharp contrast between the interactive role assigned to the Sarpanch and the Talati-cum-Mantri of a village panchayat on the one hand and the interaction contemplated between the President and the District Development Officer of the District Panchayat on the other hand. While the Secretary of the village panchayat is not vested with the executive powers of the village panchayat, whatever limited powers are conferred upon him are to be exercised by him subject to the control of the Sarpanch and it is the Sarpanch who is vested with all the executive powers of the village panchayat. That stands out in sharp contrast to the language used by the Legislature while contemplating the interaction between the President of the District Panchayat and the District Development Officer. It is thus obvious that the Legislature did not contemplate that super imposing role for the President of the District Panchayat which it contemplated for the Sarpanch for matters within the domain of the village panchayat. The contrast is too glaring to be missed or ignored.

9.3 This contrast is easier to explain in terms of the two basic principles underlying the Panchayats Act as indicated in para 8.5 above. Since at the village level, the functions of the panchayat are very limited and the size and the cost of the projects to be undertaken by the village panchayat would be very small, the principle of local self government can have a greater say and, therefore, the Sarpanch, directly elected by the entire village people, is vested with the executive powers of the village panchayat, and the village panchayat

Secretary (Talati-cum-Mantri) is to exercise his powers subject to the control of the Sarpanch. On the other hand at the District level, the panchayat functions in a large number of spheres and the size and the cost of the projects would be substantially high, as compared to the village panchayat projects. Hence, Chapter XIV of the Act referred to in para 7.8 above contains several provisions for State Government control over panchayats for their conforming to the Five Year Plans, and to the State policy in general (Sec. 238), even projects within the sphere of District Panchayats cannot be commenced without the previous financial and technical approval by the prescribed authority of the State Government (Sec. 241). If the President of the District Panchayat or the District Panchayat were not to adopt a cooperative positive attitude, the entire concept of centralized planning would go hay wire. Hence the State Legislature has not replicated the Sarpanch-Talati cum Mantri role model for the District Panchayat President and the DDO, but the DDO is vested with all executive powers to be exercised subject to the orders, if any, of the President and the District Panchayat.

9.4 Two more points need to be considered with reference to the language employed by the statute. The legislature, so familiar with the words "general or special orders" has simply said "subject to the orders". Secondly, the words "if any" after the words "subject to the orders" and before "of the President" further negate the contention of the petitioners that DDO cannot act without prior orders of the President. The Legislature has clearly expressed its intention that the executive initiative shall remain with the DDO and, therefore, he need not wait for a nod from the President before taking any executive decision or its implementation, though he must pay heed to a tap on his shoulder, if at all the President finds it necessary to do so in a given case.

9.5 In Bashiruddin Ashraf vs. The Bihar Subai Sunni Majlis-Awaqf, AIR 1965 SC 1206, a Constitution Bench of the Hon'ble Supreme Court had an occasion to consider a similar expression "subject to any order by the competent Court". Section 32 of the Bihar Waqfs Act confers jurisdiction on the Majlis to make temporary appointment when there is a vacancy in the office of the Mutwalli "subject to any order by the competent Court". The Apex Court held that "subject to any order by the competent Court" do not mean that there has to be either prior permission or subsequent assent before the appointment can be complete. The words denote that the appointment is to enure according to its tenor till an order to the

contrary is passed by a competent Court. The Apex Court held that this conclusion on the interpretation of the aforesaid words was so patently correct that nothing more than this needed to be said.

This decision, therefore, clearly bears out the above interpretation of the provisions of Section 162(1) of the Act.

9.6 As regards the opinion of the Joint Secretary to the Government in the Legal Department (Annexure "A" to the petition), apart from the fact that the same is only an opinion, it does not appear to be a considered opinion. In Municipality of Anand vs. State of Bombay, AIR 1962 SC 988 (referred to in the opinion), the Apex Court was concerned with the construction of Section 59(1) of the Bombay District Municipal Act, 1901 which provided that subject to any general or special orders which the State Government make in this behalf, any Municipality, with the sanction of the State Government in the case of City Municipalities ... ... and subject to such modifications or conditions as ... ... the State Government ... ... in according such sanction, deems fit, may impose, for the purposes of this Act, any of the following taxes, that is to say,

(iv) an octroi on ... ... goods ... brought within the octroi limits for consumption, use or sale therein.

The contention raised before the Apex Court was that once a tax has been imposed, there was no scope for the exercise of the powers of the State Government to make "any special or general orders" in relation to such tax. The Court rejected the said contention and held that "imposition of tax" is a continuing power in the sense that so long as it is in force, it points to the existence of and derives vitality from the power of the authority to impose it. The Court thereupon held that the Government is empowered both - to direct the Municipality to impose the tax when the Government considers the same necessary in the interest of municipal finance and administration, as also to direct the municipality to desist from continuing the imposition when the necessity ceases.

The above decision of the Apex Court, therefore, does not detract from the submission made on behalf of the respondents that the District Development Officer is not required to obtain prior orders of the President in all matters and that it is open to the President to

require the District Development Officer to suggest modifications or changes after the orders are issued by the District Development Officer.

9.7 A perusal of the aforesaid provisions of Section 162(1) of the Act in light of the aforesaid decisions of the Apex Court and the scheme of the Act makes it clear that it is the District Development Officer who is vested with the executive powers of the District Panchayat and he is not required to obtain prior or even subsequent orders of the President of the District Panchayat, but it is open to the President to issue orders in individual cases either to direct the DDO to take appropriate steps for securing effective implementation of resolutions or decisions of the panchayat or of any committee thereof, or after a decision is taken by the District Development Officer in administrative matters to take corrective measures. For instance, while the District Development Officer is competent to take decisions regarding transfer of panchayat employees in accordance with the provisions of the Gujarat Panchayat Services (Transfer of Servants) Rules, 1996 and proceed to implement the same also, thereafter it is open to the President of the District Panchayat upon receiving the complaint from local people or their representatives against a particular individual employee or officer and to call upon the District Development Officer to take appropriate remedial measures.

9.8 It is also pertinent to note that it is only in respect of matters which by or under the Panchayats Act (that is including matters which by the rules under the Panchayats Act) do not expressly confer or impose the duties or functions on any committee, the Presiding Officer or any Officer of the District Panchayat that the DDO is required to discharge duties and perform functions subject to the control of the District Panchayat (Section 162(2)(b)). Even the general control of the district panchayat over the DDO under sub-section (4) of Section 162 is subject to the other provisions of the Act. Thus, it is clear that when the statutory rules framed under the Gujarat Panchayats Act expressly confer powers upon the DDO or any officer of the District Panchayat, the DDO is not subject to the control of the District Panchayat, or the President in the sense that he cannot act without obtaining prior or even subsequent orders of the President or the District Panchayat. At the same time, the DDO will have to inform the President about the orders passed by the DDO in order to enable the President to exercise his powers under Section 83 of the Act.

9.9 If the Legislature had intended that the District Development Officer must obtain prior orders of the President of the District Panchayat in executive matters, the Legislature would have said so in so many words, but the Legislature was conscious of the distinction between policy decisions and the executive powers of the officers implementing the policy decisions. The Legislature, therefore, appears to have advisedly used the words "subject to the orders, if any, of the president of the district panchayat" ....., while vesting the executive powers in the District Development Officer. In other words, the Legislature appears to have been conscious of the distinction between the role to be played by the elected office bearers on the one hand and the civil servants on the other hand.

10.0 ELECTED OFFICE BEARERS & CIVIL SERVANTS

10.1 Having considered the scope of the words "subject to the orders, if any, of the president or the District panchayat Panchayat" which are used while conferring executive powers on the DDO who is a Class-I officer of the Indian Administrative Services, the Court would like to refer to the interplay between the elected office bearers and the civil servants in a democratic institution which has been the subject matter of various studies and also judicial decisions.

10.2 In A. Sanjeevi Naidu vs. State of Madras, 1970 (1) SCC 443, the Hon'ble Supreme Court made the following pertinent observations on the role of the Ministers and civil servants.

> "The cabinet is responsible to the Legislature for every action taken in any of the Ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Council of Ministers to discharge all or any of the Government functions. Similarly an individual Minister is responsible to the Legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility. Even the most hard working Minister cannot attend to every business in his department. If he attempts to do it, he is bound to make a mess of his department. In every well planned administration, most of the decisions are

taken by the civil servants who are likely to be experts and not subject to political pressure. The Minister is not expected to burden himself with the day-to-day administration. His primary function is to lay down the policies and programmes of his ministry while the Council of Ministers settle the major policies and programmes of the Government. When a civil servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. It is always open to a Minister to call for any file in his ministry and pass orders. He may also issue directions to the officers in his ministry regarding the disposal of Government business either generally or as regards any specific case. Subject to that over all power, the officers designated by the 'Rules' or the standing orders, can take decisions on behalf of the Government. These officers are the limbs of the Government and not its delegates."

(emphasis supplied)

10.3 Again the following observations in the same vein have been made by the Hon'ble Supreme Court in Tarlochan Dev Sharma vs. State of Punjab, AIR 2001 SC 2524 :-

"15. In the system of Indian Democratic Governance as contemplated by the Constitution senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No Government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In Anirudhsinhji Jadeja (1995) 5 SCC 302 : (1995 AIR SCW 3543 : AIR 1995 SC 2390), this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the

direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in the Purtabpur Company Ltd., AIR 1970 SC 1896, are instructive and apposite. Executive officers may in exercise of their statutory discretions take into account considerations of public policy and in some context policy of Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicitly statutory provision has been made for instructions by a superior to bind them."

10.4 In "Government and Bureaucracy in India of 1947-1976" by Mr BB Mishra, the following pertinent observations are made :-

"It must, however, be recognized that even the most dynamic and competent of Minister has understandable limitations which restrict the sphere of direct participation in all the intricate and detailed aspects of administration. These include the complexities of a modern government, the possibility of frequent changes in the ministerial field, the frequency of visits to constituencies, parliamentary preoccupations and, above all, the technical nature of the various decisions that have to be made without a thorough knowledge of connected papers contained in original files. The Minister's dependence on his Secretary necessarily increases in a democratic set-up. And although his leadership in the entire sphere of administration is in theory recognized as all pervasive, the scope of his actual operation does not go much beyond a clear understanding and direction of policy matters, and not a knowledge of details. Thus the Maxwell Committee in 1937 laid down a principle calculated to ensure administrative efficiency within the framework of ministerial responsibility. The Committee emphasized that as collective ministerial responsibility maintained the political unity of government, so should the unity of administrative control of each Department be ensured by concentrating the responsibility to advise the Minister in one official, namely the Secretary. This right of the Secretary to advise without fear or favour was later recognized in the post-Independence

period also. Constitutional guarantees for that purpose were provided to protect civil servants."

10.5 The learned counsel for the petitioners has referred to the definitions of "administration", "supervision" and "executive powers" in Law Dictionaries and also in the decisions of the Apex Court in State of Bihar vs. J.A.C. Saldanna, AIR 1980 SC 326 and in Rai Sahib Ram Jawaya Kapur vs. State of Punjab, AIR 1955 SC 549.

The controversy is not really about the meaning and scope of expression "executive powers" but to what extent the President of the District Panchayat can control the exercise of the executive powers vested in the District Development Officer.

10.6 It is, therefore, clear from the aforesaid judicial dicta of the Hon'ble Supreme Court and various studies that the political executive and the civil servants have to run the institution smoothly and properly perform their respective roles. The political executive are to formulate policies and programmes and the civil servants are to execute those programmes and policies. Of course, even in the matter of formulation of policies and programmes, the civil servants can make significant contribution by bringing the relevant data to the notice of the political executive for formulating the policies and programmes. Similarly, the political executive can bring to the notice of the civil servants any difficulties which the people face when the policies are being implemented, but it does not mean that the distinction between the roles assigned by the State Legislature to the President on the one hand and the DDO and other civil servants on the other hand is to be obliterated.

11.0 SECTIONS 161, 162 AND 227 OF THE PANCHAYATS ACT

11.1 Section 2(6) of the Act provides that "District Development Officer" means such officer as the State Government may appoint to be a District Development Officer for the purposes of the Act. Sub-section (1) of Section 161 provides that there shall be a secretary for every district panchayat and a District Development Officer posted under the panchayat, shall be Ex-Officio Secretary of the Panchayat.

If the DDO were nothing more than a mere Secretary of the district panchayat, there was no need to make him an ex-officio secretary. It is because the Act

contemplates a much bigger and more important role for the DDO that Sections 2(6) as well as 161(1)(b) convey that DDO is not a mere secretary of the District Panchayat.

11.2 If the petitioners' contentions were to be accepted, the DDO would not remain the Chief Executive Officer of the District Panchayat and the powers expressly conferred upon the DDO by the following provisions of sub-sections (1) and (2) of Section 162 would become truncated, if not illusory; over and above the provision in sub-section (1) that all executive powers of the district panchayat vest in the DDO :-

I In Staff Matters -

(i) to lay down the duties of all officers and servants of the district panchayat;

(ii) appoint such class of officers and servants as may be prescribed;

(iii) exercise supervision and control over the acts of officers and servants under the district panchayat;

(iv) assess and give his opinion confidentially every year on the work of the officers holding office under the district panchayat, and forward them to the authorities prescribed by the State Government.

II In Other Executive Matters -

(i) to draw and disburse money out of the fund;

(ii) supervise and control the execution of all activities of the district panchayat;

(iii) to take necessary measures for the speedy execution of all works and development schemes of the district panchayat;

III In Matters Entrusted by State Government Under Rules-

exercise such other powers and perform such other functions as may be prescribed by the State Government.

Section 161 provide that the district panchayat

shall have such officers and servants of the district panchayat as may be determined under Section 227, they shall be appointed by such authority and their conditions of service shall be such as may be prescribed (which power is again to be found in Section 227 (5)) and that they shall exercise such powers as may be conferred on them by the panchayat subject to rules made in this behalf.

All these provisions also indicate that the DDO is the Chief Executive Officer and not a subordinate to or delegate of the President of the district panchayat, while exercising his executive powers in staff matters or other matters.

11.3 Section 227 clearly provides that the power to make rules regarding the mode of recruitment of persons appointed to panchayat service and their conditions of service is vested in the State Government and it is the State Government which is to make rules for conferring powers in respect of appointments, transfers, and promotions of officers and servants in the panchayat service and for taking disciplinary action against the officers or servants. For making recruitment, the Panchayats Act itself has created a Panchayat Service Selection Board to be manned by Chairman and members to be appointed by the State Government under Section 235. Section 236 provides for constitution of District Panchayat Service Selection Committee with President of the District Panchayat as one of its members. There are statutory rules conferring powers of transferring panchayat servants from one place to another and such powers are vested on various designated officers like Deputy District Development Officer, Executive Engineer, District Health Officer etc. subject to the instructions of the District Development Officer. These statutory Rules do not confer any such power of appointment, transfer, promotion or disciplinary action on the President of the district panchayat or the executive committee of the district panchayat, because the Legislature itself has demarcated very clear roles for the political executive and elected representatives of the people on the one hand and the DDO and other officers on the other hand.

11.4 The above Rules are made under Section 227 read with Section 274 of the Act. As per sub-sections (5) to (7) of Section 274, the Rules are to be made after previous publication and are also subject to the requirement of laying before the Legislature for thirty days after they are made and are subject to such

modifications as the Legislature may make during the same session or the next session. The fact that the Rules under Section 227 relied upon by the respondents were not subjected to any modification is also a pointer that the Legislature having made various substantive provisions of the Act subject to the rules made under the Act, did not find the said Rules as being in conflict with its intent.

11.5 Much has been argued by Mr Mehta for the petitioners that the provisions of Section 227(5) open with the words "subject to the provisions of this Act" which provisions would include Section 162 and, therefore, Section 227 should not be given such prominence. As against that the learned Advocate General has submitted that Sections 161(1) and 162(2) open with the words "subject to the provisions of this Act and the Rules made thereunder" which would include Section 227(5) and the Rules made thereunder.

Since the provisions of Section 227(5) as well as the provisions of sub-section (1) of Section 161 and sub-section (2) of Section 162 all open with the words "subject to the provisions of this Act and the rules made thereunder", one might be tempted to take a view that no provision has an overriding effect over the other and one can appreciate the legislative ambivalence to some extent. By the very nature of the controversy, it may not be possible to give clear cut neat answers to the problem of harmonising the principle of local self-government with the principle of centralised planning, but two points do emerge.

In the first place, the Act itself makes the powers as conferred by the substantive provisions of the Act subject not merely to the other provisions of the Act but also "subject to the rules made under the Act". Hence the importance of the statutory rules under sub-section (5) of Section 227 read with Section 274 of the Act cannot be undermined.

Secondly, sub-section (1) of Section 162 providing that the executive powers of the district panchayat shall vest in the DDO and that the DDO shall perform all the functions and exercise all the powers imposed or conferred upon him by or under the Act, subject to the orders, if any, of the President or of the District Panchayat begins with the words "save as otherwise expressly provided by or under this Act". It is, thus, clear that the vigour of the expression "subject to the orders, if any, or the President or of the District Panchayat" is softened by the other express

provisions of the Act as well as express provisions of the Rules made under the Act. Reference is, therefore, again required to be made not merely to the provisions of Section 227 and the rules made thereunder but also to the control provisions contained in Chapter XIV of the Gujarat Panchayats Act, 1993.

11.6 Accepting the petitioners' contention that the DDO cannot exercise any power which is not preceded by any order of the president of the district panchayat or the resolutions of the district panchayat would do grave violence not only to the provisions of Sections 161, 162 and 227 of the Act, but would also run counter to the provisions of Sections 237, 238, 240 and 241 of the Act. It is the DDO, as an officer appointed by the State Government under Sections 2(26) and 161 of the Act who can ensure that the district panchayat performs the functions and duties so as to conform to the State Five Year Plans and the National Five Year Plans and to the State policy in general and give effect to such general or special directions as the State Government may from time to time by order in writing issue in that behalf. If the DDO is to be treated as an officer subordinate to the President of the district panchayat, he (the DDO) will have to act only according to the orders of the district panchayat or he must obtain prior approval for each and every proposal of his (DDO's) from the President of the district panchayat, that would give a complete go bye to the entire concept of centralized planning and convert the district panchayats into independent autonomous units of power. As per the role delineated by the Hon'ble Supreme Court in A. Sanjeevi Naidu vs. State of Madras, 1970 (1) SCC 443, the president of the district panchayat and other elected members are responsible for framing policies and programmes within the spheres assigned to the District panchayat under Section 154 of the Act and the administrative supervision over the DDO would only extend to ensure that the policies and programmes made by the district panchayat are properly and effectively implemented by the DDO and the officers and employees of the panchayat or officers posted under the panchayat on whom the power to transfer, or to take disciplinary action against, panchayat employees is conferred.

11.7 Rejecting contentions, however, does not bring the discussion to an end, because the two principles embodied in the Gujarat Panchayats Act, 1993 (para 9.5) must be allowed to have a positive cooperative interplay in light of the discussion in para 10 above.

11.8 While the powers and functions of the President of the District Panchayat do include watching over the financial and executive administration of the panchayat and exercising administrative supervision of the District Development Officer for securing implementation of resolutions or decision of the panchayat or any committee thereof, such watching over and exercising administrative supervision does not mean taking decisions in matters on day to day administration or in matters of appointment, transfer etc. of the panchayat employees or of officers posted by the State Government under the panchayats. The Act and the Rules, therefore, do not contemplate that the District Development Officer is required to obtain prior or even subsequent approval of the President of the District Panchayat or of the District Panchayat before taking decisions in executive matters which are entrusted to the District Development Officer under the statutory rules under Section 227 of the Act. However, the power of the District Development officer to exercise such executive powers including the powers conferred by the Rules under Section 227(5) of the Act is subject to the orders of the President of the District Panchayat or the District Panchayat in individual cases i.e. it is open to the District Panchayat and to the President of the District Panchayat to issue instructions to the District Development Officer to take appropriate remedial measures in matters causing concern to the elected representatives of the people when the local people suffer any hardships or if the benefits intended to reach the people at large or the specified categories of the beneficiaries do not reach them.

11.9 In matters of preparing development projects and the projects for the benefit of the people, the elected office bearers will have a greater say while setting out the goals but for deciding as to how those goals are to be achieved, and for deciding as to through which officers and employees the particular tasks at hand are to be carried out, it is the District Development Officer and the other administrative officers who will have greater say subject to the power of the President to exercise administrative supervision over the District Development Officer for securing implementation of the resolutions or decisions of the panchayat/committee thereof.

To give an illustration, suppose the question arises as to in which village a primary health centre or a primary school should be set up from the limited funds of the Panchayat; while taking such decision, the District panchayat would play the primary role because it

is elected representatives constituting the district panchayat who are more alive to the needs of the people in the area and, therefore, the district panchayat may decide to set up the dispensary in village "A" rather than in village "B". Similarly, it is the district panchayat which will decide as to whether a primary school should be established in village "X" rather than in Village "Y". If the President finds undue delay in implementation or improper implementation of such decisions, the President can direct the DDO to take all appropriate steps for securing implementation of the resolution of the panchayat or the decision of its concerned Committee. But once the dispensary is set up or the school is established, it is for the concerned officers like the District Development Officer, District Health Officer or District Primary Education Officer to decide as to which doctor or teacher should man the concerned dispensary or the school. Neither the provisions of the Panchayats Act nor the statutory Rules thereunder contemplate that it is the President of the district panchayat who would take a decision as to which doctor or teacher should be posted at which dispensary or the school. Such matters of administration are to be looked after by the DDO and other administrative officers in charge of the concerned departments like health, education etc.

But if the people in the area have any grievance about satisfactory services not being rendered by a doctor at a particular dispensary or a teacher in a concerned school or the dispensary or the school administration not being managed properly, such grievances can also be ventilated and brought before the President of the district panchayat who can take up the matter with the DDO for ensuring that the legitimate grievances of the local people are redressed. When the President of the district panchayat points out such grievances, the DDO is bound to pay heed to them and look into such grievances and when he finds that there is some substance in the grievances, he is bound to take appropriate action. However, it is far from saying that no posting of a doctor in a dispensary or no posting of a teacher in a school can be made by the DDO (aided by the District Health Officer or by the District Primary Education Officer, as the case may be), without prior orders of the President of the district panchayat.

11.10 The above discussion does not mean that the DDO is not subject to any supervision of the President of the district panchayat. In proper cases, the President of the District Panchayat or the district panchayat as a

body, may invite the attention of the DDO, who is the secretary of the panchayat to take necessary steps for more effective implementation of the resolutions of the district panchayat i.e. for proper implementation of the policies and programmes of the district panchayat which may be in various spheres assigned to the panchayat under Section 154 of the Act, but the EXECUTIVE INITIATIVE remains with the DDO.

12.0 PANCHAYATS ACT AND BPMC ACT

12.1 Coming to the contention of Mr Mehta with reference to the difference between the language of the Bombay Municipal Corporations Act and the powers conferred on the Municipal Commissioner on the one hand and the language of the panchayats Act and the powers conferred on the DDO, the contention though attractive at the first blush, the same cannot be accepted for the simple reason that it proceeds on the basis that there are only two possible roles which can be assigned to a civil servant in a local self-government institution: it can be either the role of the Municipal Commissioner under the BPMC Act or a subordinate civil servant role of the DDO under the President of the district panchayat as canvassed by the petitioners. While there is no doubt about the fact that the powers of the Municipal Commissioner under the BPMC Act are more extensive and that the Mayor of a Municipal Corporation is more of a titular head than the president of the district panchayat, at the same time, the President of the district panchayat does not automatically get the role or powers of the Chief Minister of a State which Mr Mehta for the petitioners would like to confer upon the President of the district panchayat, but the Constitution or the State Legislature have chosen not to.

12.2 At this stage, reference may also be made to the decision dated 14/27.10.1969 of a Division Bench of this Court in Special Civil Application No. 662 of 1968 and other matters (Anant Mills Co. Ltd. vs. Municipal Corporation of City of Ahmedabad) relied on by Mr Mehta for the petitioners. Mr Mehta submitted that in Section 49(1) of the BPMC Act also, there is an expression "subject to the orders of the Commissioner" and that the Division Bench has interpreted the said expression in the following terms :-

> "Section 49 says that the powers and duties deputed by the Commissioner under the section are to be exercised and performed by the Deputy Municipal Commission 'subject to the orders of

the Commissioner'. The orders may be general or specific and they may be issued from time to time or at any time and at any stage of the proceeding before the Deputy Municipal Commissioner. The section thus enables the Commissioner to control the exercise and performance of the powers and duties by the Deputy Municipal Commissioner at any and every stage. It makes it obligatory on the Deputy Municipal Commissioner to follow whatever orders the Commissioner may make, while taking decisions in exercise of the power and performance of the duty deputed to him."

It is, therefore, submitted that in view of this judgment, the powers of the President of the District Panchayat under Section 162(1) also must be read on those lines.

12.3 As per the settled legal position, ratio of a decision is to be understood in the context of the controversy in that particular case. In Padma Sundara Rao vs. State of T.N., (2002) 3 SCC 533, the Apex Court has held that the Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

Now in the aforesaid case of Anant Mills, the Court was concerned with the interpretation of Section 49(1) of the BPMC Act which reads as under :-

"49 (1) A Deputy Municipal Commissioner or Assistant Municipal Commissioner shall, subject to the orders of the Commissioner, exercise such of the powers and perform such of the duties of the Commissioner as the Commissioner shall from time to time depute to him;

Provided that the Commissioner shall inform the Corporation of the powers and duties which he from time to time deputes to a Deputy Municipal Commissioner or Assistant Municipal Commissioner.

(2) All acts and things performed and done by a Deputy Municipal Commissioner or Assistant Municipal Commissioner during his tenure of office and by virtue thereof shall for all purposes be deemed to have been performed and done by the Commissioner."

It is thus clear that the expression "subject to the orders of the Commissioner" was interpreted in the context of the statutory provisions under which the Commissioner may depute (delegate) his own powers and duties and, therefore, when the delegate like Deputy Municipal Commissioner or the Assistant Municipal Commissioner exercises the powers and performs the duties of the Commissioner, the exercise of such powers and performance of such duties would be under the control of the Commissioner. Thus, the observations made in the above decision cannot be taken out of context and applied to Section 162(1) of the Gujarat Panchayats Act, 1993, where the DDO is not a delegate of the President of the District Panchayat.

THREE AREAS OF DDO'S FUNCTIONS DEMARCATED

13. Before concluding the discussion, it would be useful to demarcate the areas of the executive functions and duties of the DDO into three parts-

(i) The executive powers/functions which are specifically conferred/imposed upon the DDO by or under the Panchayats Act or under any other law for the time being in force. [Sec.162(1)]

These powers/functions the DDO will exercise/perform subject to the orders, if any, of the President or of the District Panchayat. This does not mean that the DDO is required to obtain prior or even subsequent approval of the President or of the District Panchayat but the DDO is required to keep the President of the district panchayat informed about the exercise of these powers and performance of these functions so that, where necessary, in a given case the President may give a tap on the DDO's shoulder.

The powers conferred upon the DDO by the statutory rules under Section 227(5) of the Act as well as the powers under clause (b) of sub-section (1) of Section 162, clauses (a), (c) to (j) of sub-section (2) of Section 162 and

under Section 249(4) of the Act are illustrations of powers falling in this category.

(ii) The matters in respect of which duties and functions are not expressly imposed or conferred on any committee, presiding officer or any officer of the district panchayat [Section 162(2)(b) and sub-section (4) of Section 162)].

Since these matters would be in the areas of policy formulation or analogous thereto, here the DDO exercises his powers subject to the general control of the district panchayat. Here also the EXECUTIVE INITIATIVE remains with the DDO, but he has to consult the President who may exercise the control on behalf of the District Panchayat for securing implementation of resolutions or decisions of the district panchayat or any committee thereof. In these matters also the DDO would be expected to invite the attention of the District Panchayat to the relevant portions of the Five Year Plans and the State Policy in general, so that the chances of possible or potential conflict between the resolutions of the district panchayat and the State Policy are eliminated.

(iii) The matters pertaining to State Government projects which are not funded by the District Panchayat nor entrusted to the District Panchayat for implementation.

In such matters, the DDO is neither subject to the orders of the President or of the District Panchayat nor subject to the general control of the District Panchayat or of the President.

14. IS THE DDO A DELEGATE OF STATE GOVERNMENT ? - PARAMATERS AND MODALITIES FOR EXERCISE OF CONTROL BY THE STATE GOVERNMENT

Even while laying down the aforesaid principles regarding the scope of role and powers of the President of the district panchayat and the DDO, it must be clarified that while the DDO is an officer of the Indian Administrative Service in the State cadre and is also an officer who is expected to carry out the control provisions of Chapter XIV of the Gujarat Panchayats Act, 1993; the DDO is not a mere delegate of the State Government to whom anyone or everyone in the State Government can issue instructions or orders on any

subject or issue. The DDO is also an ex-officio Secretary of the District Panchayat and, therefore, the State Government can issue instructions to the DDO in executive matters of the District Panchayat only in accordance with the provisions of Sections 162(2)(i), 238, 241, 247, 249 (5), 252, 253, 258 and 259 of the Gujarat Panchayats Act, 1993 which are the relevant control provisions in Chapter XIV of the Gujarat Panchayats Act, 1993 and other statutory provisions. It must also be emphasized that it is only the officers of the State Government authorised by the Rules framed under Section 241 or under similar other provisions of the Act or in absence of such Rules the officers of the State Government and the Ministers authorised by the Rules of business of the State Government to deal with the particular subject in a given case covered by the aforesaid relevant provisions of the Act who can issue instructions to the DDO on any particular matter provided such instructions fall within the parameters of the aforesaid control provisions. Only then will the DDO be in a position to play his role and perform his functions as ex-officio Secretary of the District Panchayat and only then the President of the District Panchayat will be able to play his role and perform his functions consistent with the dignity and status of the office of the President of the District Panchayat as contemplated by the provisions of Gujarat Panchayats Act, 1993. While the aforesaid control provisions of the Act are applicable in respect of executive matters falling under the provisions of Sections 161 and 162 of the Act, it is clarified that in respect of projects which are of the State Government and funded from the State exchequer and which are neither paid from the panchayat funds nor entrusted to panchayats, it would be open to the concerned Head of the Department of the State Government to issue instructions to the DDO and in respect of such projects it would obviously not be necessary for the DDO to consult the President of the district panchayat as he is not subject to any orders of the President of the district panchayat or the district panchayat in such matters.

RESOLUTIONS /ORDERS OF THE DISTRICT PANCHAYAT/PRESIDENT

15. A perusal of the resolution of the Sabarkantha District Panchayat and the order of its President at Annexures "L" and "M" respectively clearly reveal that they are passed on the premise that the DDO cannot take any decision in executive matters before consulting the President. The petitioners have prayed for a direction to the DDO to take decisions regarding appointment,

transfer, promotion and posting of the officers and employees of the district panchayat only in accordance with the orders of the President of the district panchayat and to comply with the President's order dated 13-12-2001 which prayer is also based on the premise that the DDO can not take any decision except in accordance with the orders of the President and/or the district panchayat. As per the above conclusions, the said premise is not tenable and the scope of the powers of the DDO and the President in staff matters is already indicated in the above discussion. The order dated 13-12-2001 of the President of the district panchayat is accordingly inconsistent with the principles laid down in this judgment and, therefore, no directions can be given to enforce the same. So also the general directions contained in the letter dated 1-2-2002 of the President of the Jamnagar District Panchayat and in the letters dated 14-6-2001 and 3-9-2001 of the President of the Junagadh District Panchayat, are inconsistent with the principles laid down in this judgment and, therefore, cannot be enforced through the writ of this Court.

16. SUMMARY OF CONCLUSIONS

(i) BASIC SCHEME (Para 8)

(a) The Constitution has not conferred upon District Panchayats or any other institution of local self-government any status or role conferred upon States as provinces in a federation. While constitutional status is conferred on Panchayats as institutions of self-government, the Constitution has left it to the State Legislature to determine the extent of devolution of powers to such institutions at the appropriate level, subject to such conditions as may be specified in the State enactment. (paras 8.2 and 8.4)

(b) The State Legislature has in the Gujarat Panchayats Act, 1993 provided for fusion of the principle of local self-government with the principle of centralised planning. If not properly operated, the two principles may have the potential of conflicting with each other but the Legislature has, by carefully selected expressions, carved out distinct roles for elected heads of Panchayats and for civil servants and also provided for State Government control for specific purposes. (paras 8.3 and 8.5)

(ii) The executive powers of the District Panchayat are not vested in the President of the District Panchayat, unlike the vesting of the executive powers of the village panchayat in the elected Sarpanch (paras 9.2 and 9.3).

(iii) The executive powers of the District Panchayat are vested in the District Development Officer and the exercise of these powers is subject to the orders, if any, of the President of the District Panchayat or the District Panchayat, as the case may be. But this does not mean that the District Development Officer is required to obtain prior orders of the President or the District Panchayat. (para 9.7)

(iv) While the powers and functions of the President of the District Panchayat do include watching over the financial and executive administration of the panchayat and exercising administrative supervision on the District Development Officer for securing implementation of resolutions or decision of the panchayat or any committee thereof, such watching over and exercising administrative supervision does not mean taking decisions in matters of day to day administration or in matters of appointment, transfer or other conditions of service of the panchayat employees or of officers posted by the State Government under the panchayats. The Act and the Rules, therefore, do not contemplate that the District Development Officer is required to obtain prior approval of the President of the District Panchayat or of the District Panchayat before taking decisions in executive matters, much less in matters which are entrusted to the District Development Officer by the statutory rules under Section 227 of the Act. (para 11.8)

(v) However, the power of the District Development officer to exercise such executive powers including the powers conferred by the Rules under Section 227(5) of the Act is subject to the orders of the President of the District Panchayat or the District Panchayat in individual cases i.e. it is open to the District Panchayat and to the President of the District Panchayat to issue instructions to the District Development Officer to take appropriate remedial measures in matters

causing concern to the elected representatives of the people, when the local people suffer any hardships or if the benefits intended to reach the people at large or the specified categories of beneficiaries do not reach them. (paras 9.7 and 11.8)

(vi) The DDO is not merely a Secretary of the district panchayat. The Act has contemplated a much larger and more important role for the DDO. In all executive matters while the DDO need not wait for a nod of approval from the President, he must pay heed to a tap on the shoulder from the President, if at all the President finds it necessary to do so in a given case. In short, the EXECUTIVE INITIATIVE remains with the DDO. (paras 9.4, 11.1, 11.2, 11.6 and 11.10)

(vii) In matters of preparing development projects and the projects for the benefit of the people within the sphere of Panchayats, the elected office bearers will have a greater say while setting out the goals, but in deciding as to how those goals are to be achieved, and for deciding as to through which officers and employees the particular tasks at hand are to be carried out, it is the District Development Officer and the other administrative officers who will have greater say, subject to the power of the President to exercise administrative supervision over the District Development Officer for securing implementation of the resolutions or decisions of the panchayat/committee thereof. (para 11.9)

(viii) The illustration given in para 11.9 hereinabove exemplifies the scheme of the Gujarat Panchayats Act and the roles envisaged for the President of the district panchayat and the administrative officers. In any Panchayat set-up, it is for the DDO and other administrative officers and the President of the District panchayat and other elected representatives of the people to build up a smooth working relationship. No administration can effectively or properly function if the political executive and the civil servants are always at logger heads or if they do not focus their attention on their basic duties i.e. formulation of policies and programmes by the political executive and implementation of such policies and programs by the civil servants.

It is with the aforesaid perspective that the President of the district panchayat and the DDO have to play their respective roles and with due sensitivity to the role of the other. They have to co-operate with and complement each other and function as the two wheels of a chariot. The difficulty arises when the wrong question is asked as to who is in the driver's seat - the President or the DDO? The simple answer to this question which ought not to arise in the first place is - the public welfare has to be in the driver's seat. Once this truth is realised, the panchayat administration will run very smoothly and as intended by the Constitution as well as the Legislature.

(ix) The question whether the DDO is to exercise his executive powers subject to the orders of the President and the District Panchayat or subject to the general control of the District Panchayat will depend on the nature of the matters in which such powers are to be exercised. (para 13)

(x) The State Government may exercise its control over the district panchayat through the DDO within the parameters and as per the modalities as indicated in para 14 hereinabove.

(xi) Resolution No.6 passed by the Sabarkantha District Panchayat on 21-11-2001 (Annexure L) and the office order dated 13-12-2001 (Annexure M) issued by the President of the Sabarkantha District Panchayat are illegal, as they are inconsistent with the principles laid down in this judgment. (para 15)

(xii) So also in case of Junagadh and Jamnagar district panchayats, orders of the Presidents of these respective district panchayats suffer from the same infirmity. (para 15)

O R D E R S

17. The petitions are accordingly disposed of in terms of the above conclusions.

Prayers (A) and (B) are rejected. As regards prayers (C), (CC) and (D) made by the petitioners in Special Civil Application No. 1192 of 2002 and similar

prayers in other petitions on the basis of the Resolution passed by the District Panchayat or on the basis of the orders passed by the President of the District panchayat requiring the DDO to place all the files before the President of the District Panchayat for consultation before taking any decision regarding any matters within the purview of the District panchayat, the said orders are omnibus orders which are not in consonance with the provisions of the Gujarat Panchayats Act, 1993 as interpreted in this judgment and, therefore, the mandamus as prayed for in terms of paras 6(C), (CC) and 6(D) in Special Civil Application No. 1192 of 2002 or similar reliefs prayed for in terms of para 6(E) in Special Civil Application No. 4995 and 4997 of 2002 are not granted.

18. Subject to the conclusions recorded hereinabove, Rule is discharged in each petition with no order as to costs. The ad-interim relief granted earlier stands vacated.

19. The Court would like to place on record the valuable assistance received from Mr Tushar Mehta for the petitioners as well as from learned Advocate General Mr SN Shelat and learned AGP Ms Manisha Lavkumar for the State Government and the Development Commissioner.

(M.S. Shah, J.)

At this stage, the learned counsel for the petitioners pray for extending the ad-interim relief granted earlier in order to enable the petitioners to have further recourse in accordance with law.

Since the ad-interim relief was granted in Special Civil Application No.1192 of 2002, the same shall continue till 30th November, 2002.

(M.S. Shah,J.)
zgs/sundar-